



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-5/56413

PRELIMINARY RECITALS

Pursuant to a petition filed January 8, 2003, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Brown County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on February 24, 2003, at Green Bay, Wisconsin.

The issue for determination is whether petitioner is ineligible for MA due to the divestment of assets.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Represented by:

(petitioner's rep)

Respondent:

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, P.O. Box 309
Madison, WI 53707-0309

By: Sue Salmon, ESS
Brown County Dept Of Human Services
Wisconsin Job Center
325 North Roosevelt Street
Green Bay, WI 54301

ADMINISTRATIVE LAW JUDGE:

Kenneth P. Adler
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is an institutionalized resident of Brown County. He was eligible for Institutional MA in July 2002.
2. Petitioner was a married individual and his spouse resided in the community prior to July 2002. Petitioner was determined eligible for Institutional MA under the spousal impoverishment provisions of Wis. Stat. 49.455.

3. On June 12, 1998 petitioner and his spouse signed the following Marital Property Agreement:
Marital Property Agreement executed by the deceased spouse and the petitioner's durable power of attorney, (daughter) on June 12, 1998. In the agreement, both husband (by his POA) and wife waived any rights and interests in each other's marital property during their lives and after each other's death; and it provided that assets held solely in (petitioner) name would be transferred at her death to their children in equal shares (including POA Jordan). Exhibit 1
4. On July 26, 2002 petitioner's wife and community spouse passed away.
5. At the death of petitioner's community spouse his category of eligibility for Institutional MA transitioned from spousal impoverishment to SSI-related medically needy MA.
6. On August 15, 2002 the county agency issued a notice of decision informing petitioner his MA would be discontinued effective August 13, 2002 based upon a failure to verify requested information.
7. On October 8, 2002 petitioner, through his authorized representative and power of attorney, requested a hearing on the MA discontinuance for failure to verify assets.
8. On December 4, 2002 the Division of Hearings & Appeals issued a decision with the following Findings of Fact.
 6. Subsequent to August 12, 2002, the petitioner provided the county agency with a copy of a Marital Property Agreement executed by the deceased spouse and the petitioner's durable power of attorney (daughter) on June 12, 1998. In the agreement, both husband (by his POA) and wife waived any rights and interests in each other's marital property during their lives and after each other's death; and it provided that assets held solely in (petitioner) name would be transferred at her death to their children in equal shares (including POA). See, Exhibit #4.
 7. On October 3, 2002, (daughter) as administrator of the estate of (petitioner), filed a petition with the Brown County Circuit Court for the probate of (petitioner) estate, listing her assets, which totaled \$118,486.78. See, Exhibit #7.
 8. On or about October 3, 2002, the Brown County Circuit Court approved the petition filed by (daughter) and ordered the disposition of the assets in her estate (\$118,486.78) requested, i.e., the transfer of the assets in equal shares to the three children of (petitioner's spouse) and (petitioner). See, Exhibit #7.
 9. At no time after (petitioner) demise and prior to the order of disposition described in Finding #8, above, did (daughter), as durable power of attorney for (petitioner's spouse), ever make a claim against (petitioner) estate, nor file any objection to the disposition of (petitioner) estate in its entirety to the couple's three children.
 10. On a date unknown after October 2, 2002, the petitioner's attorney (and the attorney for the estate) provided a copy of the probate pleadings described in Finding #7, to the county agency, for the first time fully disclosing (petitioner's spouse) assets to the county agency after the August 2, 2002, request directed to (petitioner's spouse) by the county agency. See, Exhibit #7.

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9. The December 4, 2002 decision of the Division of Hearings & Appeals made the following Conclusions of Law and Order:

CONCLUSIONS OF LAW

1. The county agency correctly discontinued the petitioner's Institutional – MA, effective September 1, 2002, because the petitioner had failed to provide verification of his deceased community spouse's estate assets, a required verification item.

2. The county agency incorrectly failed to review and re-determine the petitioner's eligibility for Institutional – MA when his representative provided a copy of the Marital Property Agreement and estate pleadings and a dispositional order on a date unknown after October 2, 2002.
3. The matter must be remanded for review and re-determination of the petitioner's eligibility for Institutional – MA retroactive to the date of full verification of the community spouse's estate assets, whenever that occurred.

NOW, THEREFORE, it is

ORDERED

That the matter is remanded to the county agency with instructions to review and re-determine the petitioner's eligibility for Institutional – MA retroactive to the date the petitioner fully verified the community spouse's estate assets by submission of a copy of the probate pleadings, considering whether a divestment occurred, and with written notice. IT IS FURTHER ORDERED, that the petition for review as it concerned the discontinuance of MA due to a failure to verify information, effective September 1, 2002, herein be, and the same hereby is, dismissed.

10. On December 12, 2002 the county agency issued a notice informing petitioner it had concluded he had divested assets in the amount of \$118,486.78 for a penalty period of 27 months of ineligibility. The penalty period was alleged to have begun at the death of the community spouse on July 26, 2002. Petitioner would remain ineligible until September 30, 2004. Exhibits 2, 3

DISCUSSION

A divestment is a transfer of assets for less than fair market value. Wis. Stat. 49.453(2)(a), MA Handbook, Appendix 14.2.1. A divestment or divestments made within 36 months (60 months if the divestment is to an irrevocable trust) before an application for nursing home MA may cause ineligibility for that type of MA. Wis. Stat. 49.453(1)(f), MA Handbook, App. 14.3.0. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment, commonly known as "MA card services". The penalty period is specified in Wis. Stat. 49.453(3), as the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services currently \$3,726.

The MA Handbook, Appendix 14.2.1 further explains divestment actions as follows:

"Divestment" is the transfer of income, non-exempt assets, and homestead property, which belong to an institutionalized person, or his/her spouse or both:

1. For less than fair market value of the income or asset,
2. a. By an institutionalized person, or
 - b. By his/her spouse, or
 - c. By a person, including a court or an administrative body, with legal authority to act in place or on behalf of the institutionalized person or the person's spouse, or
 - d. By a person, including a court or an administrative body, acting at the direction or upon the request of the institutionalized person or the person's spouse. The includes relatives, friends, volunteers, and authorized representatives.

It is also divestment if a person takes an action to avoid receiving income or assets s/he is entitled to. Actions which would cause income or assets not to be received include:

- ...
2. Disclaiming an inheritance
- ...

6. Refusing to take action to claim the statutorily required portion of a deceased spouse's or parent's estate. Count the action as divestment only if:

...
b. There is certainty that a legal action will be successful.

This includes situations in which the will of the institutionalized person's spouse precludes any inheritance for the institutionalized person. Under Wisconsin law, a person is entitled to a portion of his/her spouse's estate. If the institutionalized person does not contest his/her spouse's will in this instance, the inaction may be divestment.

The MA Handbook, Appendix 14.2.1, no. 6, provides that divestment occurs if a person refuses to take action to claim the statutorily required portion of a deceased spouse's estate. It is a divestment only if there is certainty that a legal claim against the estate will be successful. In *Tannler v. Wisconsin Dept. of Social Serv.*, 211 Wis. 2d 179, 564 N.W. 2d 735 (1997), the Supreme Court upheld the Handbook provision concerning the refusal to make a claim against an estate, but at 211 Wis. 2d 186, the Court noted that there should be a certainty that the legal action will be successful.

The county agency explained it concluded a divestment had occurred at the time the community spouse died and the institutionalized spouse did not pursue recovery of the proceeds of the estate. At that time the assets, pursuant to the Marital Property Agreement (MPA), were to pass directly to the children of petitioner and his community spouse, with petitioner having waived his right to those assets pursuant to the MPA.

The county agency references the MA Handbook, Appendix 23.4.0, Assets. That section specifically concerns spousal impoverishment, but addresses the *initial* eligibility determination – not a divestment situation. The section provides as follows:

Count the combined assets of the institutionalized person and his/her community spouse.
(Note: Disregard prenuptial agreements. They have no affect on *spousal impoverishment determinations*.)

As the county believes it is to disregard an MPA pursuant to the above MA Handbook provision, it concluded petitioner should be able to seek recovery of his wife's estate irregardless of the MPA. Therefore, the failure to do so upon her death resulted in a divestment.

Petitioner's representative asserts the action in this case is not a spousal impoverishment determination – it is a divestment determination. In fact, once petitioner's community spouse died, his MA classification changed from a spousal impoverishment MA case to a medically needy MA case. And, the penalty period calculated in this particular case is entirely for the period of time petitioner is a classified as a medically-needy MA case. However, the MA Handbook provision cited above clearly applies to spousal impoverishment cases.

Petitioner's representative then also asserts unless it is determined the MPA is invalid somehow, we could start a probate on the case, but the representative explains he feels the claim by the institutionalized spouse would have to fail based upon the signing of the MPA and his waiver of his marital rights. From that standpoint, forcing the institutionalized spouse to make that election based upon the MPA would be fruitless because the MPA is a valid agreement.

This Division has followed *Tannler* in the past. (See MED-36/14840.) However, in other prior hearing decisions *Tannler* was found to not apply. (See MDV-40/37280 and MDV-3/21409.) The reason it was not followed in each case was the existence of a long-standing MPA signed by the institutionalized

spouse and the community spouse. The presence of that MPA made it unlikely that MA recipient would succeed in a claim against her deceased spouse's estate. Unless it could be argued that the MPA was invalid, such a claim likely would most likely fail.

Based upon my review of the record, I am persuaded the MPA signed in June 1998 makes it unlikely petitioner would succeed in a claim against his deceased spouse's estate. Therefore, I must conclude there was no divestment at the time of the death of the community spouse or any time thereafter based upon petitioner's failure to seek recovery from her estate.

CONCLUSIONS OF LAW

1. That petitioner did not divest assets when he refused to make a claim on his wife's estate because a marital property agreement made the success of such a claim uncertain.
2. That petitioner remains eligible for SSI-related medically needy MA.

NOW, THEREFORE, it is

ORDERED

That the matter be remanded to the county with the following instructions: (1) remove the divestment, (2) rescind the divestment penalty for failure to make a claim against petitioner's wife's estate, and (3) reinstate petitioner's institutional MA, if he is otherwise eligible. This action is to be taken within ten (10) days of the date this decision is signed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 11th day of
April, 2003

/sKenneth P. Adler
Administrative Law Judge
Division of Hearings and Appeals
86/KPA